92-1285

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BETTY TINSLEY, *et al.*,
Petitioners,

v.

AMERICAN PRESIDENT LINES, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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December 14, 1992

QUESTIONS PRESENTED

1. In affirming summary judgment against them as maritime claimants suing in state court, did the California Court of Appeal deny petitioners' constitutional right to an adjudication under the admiralty law of the United States when it

a) applied a test other than that fashioned by this Court to decide whether a Jones Act cause of action would be presented to a jury; and

b) failed to consider evidence in light of the substantive maritime law applicable to the case?

2. If so, did the California Court of Appeal disrupt the uniform application of the maritime law, required by the Constitution in all courts to which Congress has extended the admiralty jurisdiction?

LIST OF PARTIES

Petitioners are Betty Tinsley, Dennis Tinsley, Carole Stinnett, Joanne Branconi and Elaine Burstein, the heirs of Charles Tinsley, who were plaintiffs and appellants in the proceedings below.

Respondent is American President Lines, Ltd. ("APL"), defendant and respondent below. Philip Morris Incorporated ("Philip Morris"), the cross-defendant in the trial court proceedings, was not a party to the appeal to the California Court of Appeal, and is not a party to this petition.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceedings on June 11, 1992.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 6 Cal.App.4th 562, 8 Cal.Rptr.2d 851, and 1992 AMC 2055, and is reprinted in the Appendix at pages A-1 to A-10.

JURISDICTION

The decision sought to be reviewed is that of the Court of Appeal of California, First Appellate District, entered on June 11, 1992, affirming summary judgment against petitioners. Petitioners' timely request for rehearing was denied on June 2, 1992. The Supreme Court of California, in bank, denied a petition for review on September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article III, Section 2, Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 *et seq.*; 28 U.S.C. §1333; Jones Act, 46 U.S.C. §688; California Civil Code §1714.25; Restatement (Second) of Torts, §402A. The texts of these provisions and statutes are set forth in the appendix.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are the heirs of Charles Tinsley, a merchant seaman who died of lung cancer associated with cigarette smoking. Petitioners brought suit for wrongful death in the Superior Court of California against respondent American President Lines, Ltd., the owner of merchant ships on which Mr. Tinsley was employed at various times. The suit alleged that APL was negligent under the Jones Act, 46 U.S.C. §688, for selling Mr. Tinsley cigarettes without health warning labels. The

suit also alleged, under the general maritime law, that the presence of such cigarettes created an unseaworthy condition of the vessels on which Tinsley worked and lived. No other causes of action were asserted.

Material Facts

Charles Tinsley smoked cigarettes for many years, beginning about the time he began his seafaring career in 1945, through 1987. His seven years' sea service on APL ships constituted about 38 percent of his total employment by 12 different steamship companies. During this period, he purchased cigarettes at sea, from APL and other shipowners, both for his use aboard ship and for smoking ashore between voyages. He died of a squamous cell carcinoma of the right lung in January, 1989.

During the periods he worked aboard APL ships, Mr. Tinsley bought cigarettes from ships' canteens, or "slop chests." American shipowners, such as APL, are required by federal statute to stock slop chests with tobacco for sale to the crew at a modest profit. *See* 46 U.S.C. §11103.

Since 1966, Congress, through the Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 *et seq.*, has required that cigarettes sold in the United States carry a health warning - the "Surgeon General's warning" - prominently displayed on their packages. However, under an exemption provided at §1340, cigarettes manufactured for sale outside the tax jurisdiction of the United States are not required to carry the Surgeon General's warning. Within that class of cigarettes are those sold in slop chests aboard merchant ships. The statute, however, does not *forbid* placement of

the warning on such cigarettes. In fact, beginning in 1989, manufacturers have provided warnings on cigarettes intended for sale on merchant ships. The cigarettes APL purchased for resale at sea, including those sold to Charles Tinsley, did not bear the Surgeon General's warnings.

Thus, while millions of Americans were exposed to the Surgeon General's warning every time they lit a cigarette, Charles Tinsley, for the many months out of every year between 1966 and 1987 that he spent at sea, including time aboard APL ships, did not receive the Surgeon General's warning that the cigarette he was about to smoke posed a serious threat to his health.

Mr. Tinsley's status as a merchant seaman entitled him - and, later, his representatives - to bring suit against APL under the admiralty law of the United States. Exercising the election available to them under 28 USC §1333, petitioners sued for wrongful death in the Superior Court of California.

A complaint for damages, originally filed by Mr. Tinsley on December 1, 1989, was followed by petitioners' First Amended Complaint For Damages For Wrongful Death on July 3, 1989, naming as defendants American President Lines and two other shipowners, subsequently dismissed. APL answered and cross-complained against Philip Morris, the manufacturer of the brand of cigarettes regularly purchased by Tinsley from APL. On May 5, 1990, APL and Philip Morris jointly moved for summary judgment on the respective claims against them. On June 8, 1990, the trial court granted summary judgment for APL against appellants, and for Philip Morris against APL, without stating the grounds therefor. Petitioners timely noticed an appeal with

the California Court of Appeal. APL did not appeal the judgment against it in favor of Philip Morris, thus removing that entity from the case.

A panel of the California Court of Appeal affirmed the trial court's grant of summary judgment on June 11, 1992.[1] A Petition for Review of that decision was denied by the Supreme Court of California, in bank, on September 17, 1992.

Decision of the California Court of Appeal

Petitioners asserted below that two triable issues are at the heart of this action. The first is whether, under the Jones Act, selling Tinsley cigarettes without warning labels played at least some part in causing his fatal cancer. The second, prompted by the seaworthiness doctrine, is whether cigarettes without warning labels constituted an unseaworthy condition of the ships on which Charles Tinsley served.

Although petitioners briefed the federal and California authorities that require the application of maritime law in state court, it is apparent that the appeal was not decided in light of those authorities. Dismissing the Jones Act negligence claim, the appellate panel did not apply this Court's test for determining whether a Jones Act claim can be heard by a jury. The conclusion that the unseaworthiness

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[1] The Court of Appeal originally filed its decision on May 12, 1992. A petition for rehearing was denied on June 2, 1992. On June 10, 1992, on its own motion, the Court of Appeal granted a rehearing for the purpose of correcting a clerical error regarding the panel in the original decision. That decision was filed a second time, verbatim, on June 11, 1992, and certified for publication.

count would have failed for lack of causation was likewise made without reference to applicable maritime law standards.

Moreover, the court's written opinion makes it clear that it regarded the unseaworthiness count as indistinguishable from a products liability cause of action. This is evident from the court's unambiguous analysis of the issue in light of state law rules governing products liability cases. Those rules, which are codified at §1714.45, California Civil Code, and incorporate the principles of §402A of the Restatement (Second) of Torts, bar suits that allege tobacco to be an unreasonably dangerous product.

How Federal Question Was Presented

The issue of federal maritime law governing the resolution of this suit was raised by petitioners in both the trial court and on appeal. Initially, the issue arose in connection with APL's defense of preemption under the Cigarette Labeling Act. In their brief in opposition to APL's motion for summary judgment, petitioners argued that their claims could not be preempted under federal statutes because the claims arose under federal, not state law:

> This case is not, therefore, a "state law damage claim." Rather, it is to be decided under a specialized body of *federal* law. Movants do not show how the federal cigarette labeling act has preemptive effect over this body of federal law.[2]

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[2] Appendix, E-7.

Petitioners also argued in that brief that because their claims sounded in admiralty, state codes, including California Civil Code §1714.45, could not provide the rule of decision.[3] At the hearing of APL's motion for summary judgment, counsel for petitioners reiterated these points in oral argument.[4]

On appeal, petitioners fully briefed their position that because this case is governed by the maritime law, neither preemption nor state law products liability doctrines controlled.[5] Petitioners also discussed both the Jones Act standard for jury questions and evidentiary issues concerning exposure to health warnings.[6]

After the Court of Appeal affirmed summary judgment against them, petitioners sought review in the Supreme Court of California. In their petition to that court, they argued that the Court of Appeal's decision denied their right to an adjudication under the admiralty law of the United States. Petitioners also raised the issue that such denial disrupts the uniform application of the maritime law.[7] The Supreme Court of California denied the petition for review without comment.[8]

REASONS FOR GRANTING THE PETITION

In confirming, as a matter of law, that the sale of

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[3] Appendix, E-8.

[4] Appendix, F-2 - F-7.

[5] Appendix, G-7 - G-10.

[6] Appendix, G-1 - G-5.

[7] Appendix H-1 - H-10.

[8] Appendix, C-1.

cigarettes at sea without health warnings cannot constitute negligence, and that such cigarettes cannot create an unseaworthy condition, the California Court of Appeal is in direct conflict with the decisions of this Court that have repeatedly confirmed the federal courts as the source of law governing maritime cases. The decision below thus strikes at the very Constitutional rationale for the rule of uniformity in the maritime law.

Article III, Section 2 of the Constitution extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction." The Court has interpreted this grant as a requirement that the federal law of admiralty be a "system of law coextensive with, and operating uniformly in, the whole country." *The Lottawanna*, 21 Wall 558 (1875). Central to this formulation is the principle that when seamen's actions are brought in state court, the federal admiralty law, not the common law of the state, governs the case. Substituting state law as the rule of decision "would distinctly and definitely change or add to the settled maritime law" to the detriment of that law's uniformity throughout the country. *Chelentis v. Luchenback Steamship Co.*, 247 U.S. 372, 382 (1918). An intolerable consequence of such alteration is the loss of the very rights that the admiralty law confers.

As the Court explained in *Garrett v. Moore-McCormack Co., Inc*, 317 U.S. 239 (1942),

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either

> litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.

317 U.S. at 245. Accordingly, the Court has overturned numerous decisions in which state courts sought to impose a common law rule in maritime causes. In *Garrett* itself, the Court found that application of the Pennsylvania burden of proof to overturn a seaman's release deprived the seaman of the protection of the lesser admiralty standard. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), the Court disallowed the common law bar of contributory negligence to claims arising under the general maritime law. In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the common law standard of care to invitees, as opposed to the broader maritime standard, was likewise disallowed. In these and numerous other decisions, the common constitutional thread is that state courts are not competent to alter rights that originate in the federal admiralty jurisdiction.

The California Court of Appeal, without disapproval of the Supreme Court of California, has frustrated the doctrine that the maritime law is to be uniformly applied in *all* courts to which the admiralty jurisdiction has been extended.

If not reversed, the decision will signal other state courts that they, too, may effectively fashion maritime law out of their respective common law rules. Such result would foreclose uniformity through predictable and intolerable conflicts among states as each jurisdiction sought to apply its own rules of decision to the maritime causes before it.

Deference to state law in maritime cases denies, moreover, the very rights Congress sought to guarantee claimants when it conferred on state courts concurrent jurisdiction of admiralty claims. Here, in its zeal to enforce California's ban on suits seeking damages from cigarette smoking, the California court has rendered petitioners' well-pleaded maritime complaint a nullity without applying a single rule of admiralty jurisprudence. The petition should be granted so that this Court can reaffirm its rule of uniformity in the maritime law, prevent the conflicts implicit in the ruling below, and restore to petitioners their right to an adjudication under the maritime law of the United States.

The Court Of Appeal Did Not Apply The "Slightest Causation" Test For Presenting Jones Act Cases To The Jury.

In order to allow a case to go to the jury, a Jones Act plaintiff need only demonstrate that the employer's alleged negligence could have played any part, even the slightest, in causing the injuries alleged. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 (1957). Where summary judgment is sought against a Jones Act claimant, the Court has provided explicit guidance for the lower courts in applying this rule:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is present is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. *Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.*

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506-507 (1957). (Emphasis added). Here, the Court of Appeal failed to apply this test.

The court noted that Charles Tinsley smoked cigarettes before and after his employment as a seaman, and that the majority of the cigarettes he smoked were consumed on land. The court stated: "Given these facts, we must conclude Tinsley's injury was not suffered in the course of

employment, but rather in the course of a lifetime habit."[9] Since the Jones Act only provides a remedy for injuries suffered "in the course of employment," 46 U.S.C. §688, the court affirmed summary judgment on the ground that an essential element of a Jones Act claim was missing.

However, the Court of Appeal also noted that Mr. Tinsley smoked cigarettes purchased from APL during his employment by APL.[10] There is thus a reasonable inference that Mr. Tinsley's cancer could have arisen while he was employed by APL, as well as when he was not. Under *Rogers*, this possibility, even if slight, creates a question for the jury. But having concluded that Tinsley's injuries could not have arisen in the course of employment, the court presumptively resolved a question of fact without applying the *Rogers* test to the evidence before it. In effect, the court dismissed a case that the appropriate maritime rule would have sent to the jury.

By failing to apply the law of the jurisdiction in which this case arises, the California court deprived petitioners the protection of that law, with drastic consequences. As it did in *Garrett*, and on numerous other occasions, this Court must again admonish a state court that its function is to enforce, not deny, rights Congress intended to protect.

The Court of Appeal Did Not Review The Unseaworthiness Claim Under Standards Applicable To The General Maritime Law.

In response to petitioner's allegation that "cigarettes

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[9] Appendix, A-5, 6 Cal.App. 4th at 567.

[10] Appendix, A-2, 6 Cal.App. 4th at 565.

without health warnings constitute a defective and unseaworthy condition,"[11] the Court of Appeal wrote:

> we seriously question whether such labeling distinction is a sufficient basis to establish an unseaworthiness claim. Cigarettes with or without warnings attached are equally dangerous. The only advantage of a warning is that those consuming cigarettes which are so marked are probably more aware of the dangers involved. However, even assuming this to be true, appellants have cited no legal principle which would obligate a ship owner to warn his seamen of the commonly known dangers inherent in common consumer products. Implying such an obligation is unwarranted.[12]

Under the general maritime law, liability will be imposed because of an unseaworthy condition of the ship, whether or not the shipowner had knowledge of the condition, and without regard to due diligence or reasonable care in avoiding the condition. *See generally*, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944). A shipowner's failure to warn of a dangerous condition is not an element of the unseaworthiness cause of action.

The question of whether cigarettes without warnings constituted an unseaworthy condition is to be determined, according to the holdings of this Court, without inquiry into

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[11] First Amended Complaint, para. 13.

[12] Appendix, A-7 - A-8, 6 Cal.App. 4th at 569.

Charles Tinsley's state of mind, and without considering whether APL was under a duty to warn of the danger of such cigarettes. Likewise, whether cigarettes are a common consumer product is immaterial to determining seaworthiness.

But the decision below unambiguously invokes the language of California Civil Code §1714.45, which provides:

> a. In a product liability action the manufacturer or seller will not be liable if: (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge, common to the community; and (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco and butter, as identified in comment *i* to §402A of the Restatement (Second) of Torts.

Comment i to §402A of the Restatement (Second) of Torts states, in relevant part:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer...The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

It is thus apparent that the California court analyzed

petitioners' unseaworthiness cause of action in light of state law rules that bar products liability actions alleging tobacco as a dangerous product.

The inquiry the court should have made was whether the evidence showed that the *vessels* on which Tinsley served were reasonably fit for their intended purpose, not whether the *cigarettes* he smoked were common consumer products of known dangerousness. Under this test, the material issue is not whether the lack of warnings *caused* Tinsley's cancer, but whether the lack of warnings constituted an unseaworthy condition.

But the court never made this analysis. Instead, it affirmed summary judgment because it found petitioners failed to show that the "lack of warnings on cigarettes Tinsley purchased from APL was a substantial factor in bringing about his death." [13]

However, this finding evades the central inquiry of all unseaworthiness claims: whether the vessel is fit for its intended purpose. On review of summary judgment, a court must determine if there is a genuine issue for trial in light of the requirements of the substantive law governing the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Following a discussion of the state law products liability principles, the California court affirmed summary judgment without a single iota of evidence that the vessels on which Tinsley served were, in fact, seaworthy.

Evidence Relied On By The Court of Appeal Is Immaterial To The Maritime Issue Raised, And Thus Insufficient to Support Summary Judgment.

Central to petitioners' unseaworthiness claim is the

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[13] Appendix, A-8, 6 Cal.App.4th at 569.

theory that liability results from the absence, after 1966, of the Surgeon General's warning on each and every package of cigarettes Charles Tinsley smoked. That is, while *some* of the cigarettes he purchased during that time may have had the warning, others, including those purchased from APL, did not. Unlike the Jones Act quantum of minimal causation, an unseaworthy condition must be shown to have been a substantial factor in bringing about or causing the injury alleged. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988). Under the standard of review appropriate to unseaworthiness claims,

> the Court should consider all the evidence -not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and the inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict] is proper.

Comeaux v. T.L. James & Co., Inc., 666 F.2d 294, 298 (5th Cir. 1982), citing *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).[14] Here, the triable issue presented is whether intermittent exposure to health warnings could have been a substantial factor in Tinsley's continuing to smoke, at the same time millions of other Americans, who saw the

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[14] The standard of review for directed verdicts is substantially the same as that for summary judgment. *Anderson v. Liberty Lobby, supra*, 477 U.S. at 250.

warnings uninterruptedly, were induced to stop.[15] But the Court of Appeal considered no evidence that, when viewed in the light most favorable to petitioners, resolved this specific issue with the degree of certainty required on review of summary judgment.

The evidence relied on by the Court of Appeal consisted entirely of the following statements made by Betty Tinsley, Charles Tinsley's widow, in deposition: "He was his own person, and nothing anyone said was going to - if he was going to do something, he was going to do it," and "That was it," said in response to a leading question that included the phrase "if he was going to smoke, nothing anyone said was going to change that." In addition, the court referred to, but did not quote, a statement by Mrs. Tinsley that her husband first became aware of a report by

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[15] In House Report No. 449 of June 8, 1965, the Interstate and Foreign Commerce Committee stated:

> "The committee feels, however, that it is desirable that the Federal Government - upon which persons have come to rely for cautionary labeling of hazardous substances - should take affirmative action which would manifest its concern.
>
> Moreover, while the committee believes that the individual must be safeguarded in his freedom of choice - that he has the right to choose to smoke or not to smoke - we believe equally that the individual has the right to know that smoking may be hazardous to his health.
>
> Therefore the committee is satisfied that the public interest requires the inclusion of a fair and factual cautionary statement on *every* cigarette package.

1965 U.S. Congressional and Administrative News, 2352 (emphasis added). This report was cited below. *See* Appendix, G-4. The Court may take judicial notice of the findings in legislative histories. *See Clemmons v. Bohannon*, 918 F.2d 858, 865, fn. 5, (10th Cir. 1990).

the Surgeon General on the adverse health effects of smoking when it was first published in 1964.[16]

The court cited these statements as "unequivocal admissions" that warning labels had no effect on Tinsley, and concluded that therefore "no issue of causation was present." It affirmed summary judgment of the unseaworthiness claim on that ground.

But at no time during her lengthy deposition was Mrs. Tinsley asked whether her husband would have continued to smoke if he had seen the Surgeon General's warning when he smoked *each and every time* over a period of years. Because Mrs. Tinsley's statements were not made in response to this central question of repeated exposure to warning labels, such statements cannot reasonably be deemed "unequivocal admissions" of a material issue, and could not therefore justify summary judgment. See *Anderson v. Liberty Lobby, supra*, 477 U.S. at 248 (Required inquiry into materiality of evidence precedes evaluation of proofs). At most, Mrs. Tinsley's statements are merely evidence of contributory negligence, insufficient as a matter of law to keep the unseaworthiness issue from the jury. *Pope & Talbot, Inc. v. Hawn, supra*, 346 U.S. at 408-409. Moreover, when viewed in light of the applicable evidentiary standard, the few words quoted above are hardly "strong" or "overwhelming" evidence that the absence of warnings could not have been a substantial factor in Charles Tinsley's continued smoking. Certainly, the court was not free to infer such a conclusion from those words.[17]

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[16] Appendix, A-8 - A-9, 6 Cal.App.4th at 570.

[17] Nor is it clear why, as the court suggests, Mr. Tinsley's supposed awareness of the Surgeon General's 1964 report on smoking is material to determining if *repeated* exposure to health warnings would have induced him to stop smoking. In any case, his actual awareness of the

CONCLUSION

The decision of the California Court of Appeal has disturbing and far-reaching implications. On the one hand, its disregard of this Court's standard for sending Jones Act claims to the jury underscores its refusal to apply maritime law rules in a manner consistent with the requirement of the admiralty uniformity doctrine. In so doing, the California court has effectively arrogated to itself the power to alter, and hence restrict, the reach of the admiralty jurisdiction. Such a result is repugnant to the Constitution.

At the same time, the court has obscured the rationale underlying its rejection of petitioners' unseaworthiness cause of action. Because the instrumentality of injury in this case is cigarette smoking, the court seems conceptually incapable of disregarding, as it must, California statutes barring suits alleging cigarettes as a defective product. For even as it sought to justify summary judgment on narrow evidentiary grounds, the court revealed its bias that a maritime cause of action is to be treated as a common law products liability claim *solely because cigarettes* are a factor in the case. The evidentiary ruling is unmistakably tainted by the court's unwillingness to address the substantive elements of the seaworthiness count, inasmuch as the evidence it relied on is

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report is disputed. Mrs. Tinsley testified:

> Q. Did your husband ever mention anything that you recall about the Surgeon General's first report on smoking and health?
>
> A. No, he never--it was never discussed.
>
> Q. Do you know if he was ever aware of it?
>
> A. If he was, I'm not aware of it.

(Appendix, G-5) This testimony cannot reasonably be called an "unequivocal admission" of Charles Tinsley's awareness of the Surgeon General's report.

immaterial to the maritime issue raised by the complaint.

There can be little doubt that the ruling of the California Court of Appeal was intended to further California's policy of insulating producers and suppliers of tobacco from suit. However, this is not a policy of the maritime law. California's rejection of petitioners' properly pleaded maritime suit becomes, in effect, a revision of the maritime law. As this Court has repeatedly held, such revision is beyond the power of the common law courts.

If state courts are permitted to adjudicate maritime cases in light of state policy, the principle of uniformity may well be lost in a welter of conflicting jurisdictional interests. One court might invoke its premises liability laws to decide a case involving a seaman injured on a dock. Another could apply its malpractice statutes where seamen allege negligent medical treatment at sea. Applying state law indirectly through an evidentiary ruling is no less destructive of uniformity than if a court held outright that the law of admiralty is void in proceedings before it.

This petition should be granted so that the Court may affirm the primacy of the federal courts as the source of maritime law, and of the protections the maritime law confers, and so that it may instruct California that its policies cannot disrupt the uniform application of that law in all courts to which Congress has extended the admiralty jurisdiction.

Respectfully submitted.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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RON D. BARROW

A050220

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION II

BETTY TINSLEY, et al.,
Plaintiffs and Appellants,
v.
AMERICAN PRESIDENT LINES, LTD.,
Defendant and Respondent.

San Francisco Superior Court No. 900069

This is an action for wrongful death. Charles G. Tinsley, a merchant seaman, died of lung cancer in January 1989. Shortly thereafter, his heirs (appellants) filed a complaint against respondent American President Lines, Ltd. (APL), seeking damages because APL had sold Tinsley some of the cigarettes which allegedly caused his cancer. The trial court granted summary judgment in favor of APL, finding appellants could not recover as a matter of law. Appellants appeal. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Charles Tinsley worked as a merchant seaman for over 40 years, from 1945 through 1987. During that time, Tinsley worked for at least 12 different merchant shipping companies aboard approximately 42 separate vessels. Tinsley's employment by APL vessels accounted for about

38 percent of his total employment.

APL and other shipping companies are required by law to maintain a "slop chest" on their merchant vessels. (46 U.S.C. Section 11103.) A slop chest is essentially a small store of personal items which seamen may purchase. Among other things, the slop chest must contain cigarettes for use by seamen who so desire. (46 U.S.C. Section 11103(a)(7).) Because they are duty free and tax free, and because their price is limited to 10 percent above wholesale, these cigarettes are considerably less expensive than those sold at retail outlets within the United States. (46 U.S.C. Section 11103(b).)

Beginning in 1966, all cigarettes packaged for sale in the United States were required to carry a warning advising of the adverse health consequence of smoking. (15 U.S.C. Section 1333.) Cigarettes manufactured for sale and use beyond the jurisdiction of the United States, such as those for sale upon a vessel, were and are specifically exempted from the federally mandated warning requirements. (15 U.S.C. Section 1340).

Tinsley began smoking before he became a merchant seaman in 1945 and continued to smoke past the date when he last worked for APL in 1987. While working as a merchant seaman, Tinsley apparently purchased some of his cigarettes from slop chests aboard APL vessels. No warning was present on these cigarettes. Tinsley then smoked the cigarettes he had purchased both while on vessel and while on shore.

Tinsley was diagnosed as having lung cancer in 1988. He subsequently died of the disease in January 1989. Shortly thereafter, his heirs filed a complaint for wrongful death against APL, seeking to hold it responsible for damages under two theories applicable in maritime law. First, appellants alleged APL was guilty of negligence under the

Jones Act (46 App. U.S.C. Section 688) because the cigarettes which APL sold to Tinsley did not contain a statement warning of the health dangers of smoking. Second, appellants alleged that in selling cigarettes which did not have a warning, APL failed to maintain its ships in a seaworthy condition.

After what appears to have been extensive discovery, APL moved for summary judgment arguing that, as a matter of law, appellants could not recover under the theories they had alleged. The trial court agreed and entered judgment accordingly. This timely appeal followed.

II. DISCUSSION

Appellants maintain the trial court erred when it held they could not recover under either Jones Act or seaworthiness theories of liability. We disagree.

Under the Jones Act, a seaman who suffers a personal injury in the course of his employment as a result of his employer's negligence may bring an action for damages. (46 App. U.S.C. Section 688.) [1] The primary issue on this appeal as it relates to appellants' Jones Act theory of liability is whether Tinsley's injury occurred "in the course of his employment." Courts have long interpreted this phrase broadly because of the unique relationship between a seaman and his employer. As a leading commentator has recognized, "The nature of the seaman's employment is such

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[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ' and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . . " (46 App. U.S.C. Section 688(a).)

that his vessel becomes both his factory and home--a vestigial remainder of the ancient days when apprentices and journeymen were housed and fed in the homes of their employers. When a vessel is at sea it cannot be said that the seaman's time is his own." (2 Norris, The Law of Seamen (4th ed. 1985) Section 30:30, p. 437.) Recognizing this unique relationship, courts have interpreted a wide variety of incidents, many of which did not occur on the job in the conventional sense, to be "in the course of [a seaman's] employment" for purposes of establishing Jones Act liability. For example, in *Holm v. Cities Service Transp. Co.* (2d Cir. 1932) 60 F.2d 721, 722, a seaman who suffered injuries while returning to his quarters after securing a drink of water was allowed to recover because his injuries were sustained in the course of his employment. In *Thompson v. Eargle* (4th Cir. 1950) 182 F.2d 717, 718-719, a seaman's course of employment was held to include his activities while borrowing bread from another vessel for a customary late hour snack. Even injuries occurring while on shore during a sea voyage have been held to be suffered "in the course of [a seaman's] employment" and, thus, compensable under a Jones Act claim. (See *O'Donnell v. Great Lakes Co.* (1943) 318 U.S. 36, 38-39.)

However, while the scope of activities held to be within the course of a seaman's employment as defined by the Jones Act is unquestionably broad, neither party to this appeal has cited a case where liability was found to exist under facts similar to those presented here. Appellants do not seek recovery for injuries resulting from a single event or even a series of events which occurred while Tinsley was in the service of APL; rather they seek to hold APL responsible for the consequences of Tinsley's lifetime habit of smoking merely because Tinsley continued to smoke during periods when he was employed by APL. We are unconvinced that

an extension of Jones Act liability under these circumstances is appropriate.

The undisputed evidence submitted in support of the motion for summary judgment established that Tinsley (1) began smoking cigarettes when he was in high school, before he was ever employed as a seaman; (2) smoked the majority of his cigarettes on land while in California; and (3) continued to smoke cigarettes until May 1988, almost a year and a half after he was last employed by APL or any other shipping company. Given these facts, we must conclude that Tinsley's injury was not suffered in the course of his employment, but rather in the course of a lifetime habit. Since an essential element for establishing a Jones Act claim was missing, summary adjudication was properly granted on this theory of liability.

This conclusion is supported by substantial public policy concerns. Interpreting a claim, such as that presented here, as one arising in the course of a seaman's employment would mean that Jones Act liability could be established by any seaman claiming injury as the result of his long and continued ingestion or use of a consumer product, so long as he used or consumed some portion of that product while serving on a merchant vessel. Employers of seamen would thereby become the virtual guarantors of their employees' health. Such an extension of Jones Act liability is unprecedented and unwarranted.

In an attempt to refute this conclusion, appellants rely primarily upon the minimal standard of causation which must be shown to establish Jones Act liability. Under well established rules, legal cause is proven when an employer's negligence plays "any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 506.) One commentator on maritime law has gone so far as to describe

this burden as featherweight." (Gilmore & Black, The Law of Admiralty (2d ed. 1975) Section 6-36, p. 377.) We believe this argument improperly blurs the distinction between the issues of causation and of whether an injury occurred in the course of a seaman's employment. While under the authorities cited a plaintiff's burden of proving causation is indeed slight, causation only becomes an issue if the injury generating the litigation occurs in the course of a seaman's employment. Appellants have not proven Tinsley was injured in the course of such employment, and their arguments concerning the minimal Jones Act burden of proving causation of that injury are accordingly inapposite.

We also believe the trial court properly ruled that appellants could not recover on their seaworthiness cause of action. Under the seaworthiness doctrine, a ship owner is responsible for any injury or death which is caused by his failure to provide a vessel which is reasonably fit for its intended purpose. (See 2 Norris, The Law of Seamen, *op. cit. supra*, Section 27.1 et seq., pp. 190-195.) Breach of this warranty will impose liability without a showing of negligence or fault. If an unseaworthy condition can be shown to have caused an injury, the exercise of reasonable care or due diligence will not relieve the ship owner of liability. (*Mahnich v. Southern S.S. Co.* (1944) 321 U.S. 96, 100.)

The issue of seaworthiness normally arises in the context of a challenge to the fitness of a vessel or its appurtenances (see, e.g., *Mitchell v. Trawler Racer, Inc.* (1960) 362 U.S. 539, 550); however, the doctrine is applied in a wide variety of circumstances. The failure to provide a competent master or officer has been recognized as constituting unseaworthiness. (*The Rolph* (9th Cir. 1924) 299 F. 52, 55), as has the assignment of an insufficient number of persons to perform a task (*Waldron v. Moore-McCormack Lines* (1967)

386 U.S. 724, 727-728). Unseaworthiness has also been held to arise from unsafe or deficient living conditions such as toxic fumes (*Smith v. Ithaca Corp.* (5th Cir. 1980) 612 F.2d 215, 219, disapproved on other grounds, *Beech Aircraft Corp. v. Rainey* (1988 488 U.S. 153), or the absence of toilet facilities (*Deal v. A.P. Bell Fish Co.* (5th Cir. 1982) 674 F.2d 438, 442). One case has even extended the doctrine to include a box of soft drinks intended for a ship's store. (*Martinez v. Sea Land Services, Inc.* (1st Cir. 1985) 763 F.2d 26.) The court held that a seaman, who was carrying a box and injured his back when a plastic sleeve surrounding the drinks slipped, had stated a cause of action for unseaworthiness. (*Id.* at pp. 27-28.)

Unquestionably, the range of conditions on board ship held to be within the seaworthiness doctrine is wide. However, once again, appellants have failed to cite a single case where a vessel was held to be unseaworthy under facts similar to those they present here. Appellants do not argue APL's ships were unseaworthy because cigarettes were sold on board; they argue APL's ships were unseaworthy because the cigarettes which were sold did not possess a warning label. Since the essence of an action for unseaworthiness is proof that the ship owner provided something which was not fit for its intended purpose, appellants, in effect, maintain that, while cigarettes which possess a warning are fit for consumption, the same cigarettes *without* a warning are not and furnishing them for purchase by a seaman produces an unseaworthy condition.

We seriously question whether such a labeling distinction is a sufficient basis to establish an unseaworthiness claim. Cigarettes with or without warnings attached are equally dangerous. The only advantage of a warning is that those consuming cigarettes which are so marked are probably more aware of the dangers involved. However, even assuming this

to be true, appellants have cited no legal principle which would obligate a ship owner to warn his seamen of the commonly known dangers inherent in common consumer products. Implying such an obligation is unwarranted. Carried to its logical extension, such obligation would require a ship owner to warn seamen of the potential dangers to health, known or suspected, of every common consumer product constituting food or drink each time it was served.

In any event, we need not base our decision on the rather anomalous distinction which appellants seek to draw, because appellants' seaworthiness theory of liability must fail on other ground. Unlike claims based upon the Jones Act, where an owner's negligence need only play a slight part in bringing about the injury alleged, to establish proximate cause in a seaworthiness action, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury alleged. (*Johnson v. Offshore Exp., Inc.* (5th Cir. 1988) 845 F.2d 1347, 1354.) In the context of the present case, appellants bore the burden of proving that the lack of warnings on cigarettes Tinsley purchased from APL was a substantial factor in bringing about his death. Even under the liberal rules applicable when considering motions for summary judgment, appellants failed to meet this burden.

In support of its motion, APL relied primarily upon portions of the deposition of Betty Tinsley, the wife of Charles Tinsley. Mrs. Tinsley stated that she and her husband became aware of the Surgeon General's report on the adverse health effects on smoking when it was first published in 1964, but that it made absolutely no effect on her husband's decision to smoke. As Mrs. Tinsley admitted, "[He] was his own person, and nothing anyone said was going to -- if he was going to do something, he was going to do it." When asked, "If he was going to smoke, nothing

anyone said was going to change that," Mrs. Tinsley admitted, "That was it." Mrs. Tinsley also admitted that, when her husband smoked cigarettes carrying the Surgeon General's warning, the presence of the warning made no difference in the number of cigarettes he smoked or the manner in which he smoked them. These unequivocal admissions negate the proximate cause element necessary to establish an action for unseaworthiness. The absence of a warning was simply not a substantial factor in bringing about Mr. Tinsley's death. Since that essential element of appellants' seaworthiness claim was missing, the trial court properly granted summary judgment.

Appellants maintain that Mrs. Tinsley's admissions are insufficient to sustain the trial court's ruling. Noting that, under well established rules governing motions for summary judgment, affidavits of a moving party are strictly construed while those of an opponent are construed liberally (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36), they argue that a triable issue of fact was presented as to whether the absence of warnings in fact contributed to Mr. Tinsley's death. This argument ignores the high level of credibility afforded to admissions made during discovery. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22.) Admissions made in depositions are "entitled to and should receive a kind of deference not normally accorded" to other types of evidence. (*Ibid.*) Here, affording Mrs. Tinsley's admissions the weight to which they are entitled, we must conclude no issue of causation was present. The trial court properly granted summary judgment.[2]

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[2] Having reached this conclusion, we need not determine whether, as respondent maintains, appellants' unseaworthiness cause of action is also barred by section 402A of the Restatement Second of Torts.

III. DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

PETERSON, J.
We concur.
KLINE, P.J.
SMITH, J.

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COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 2

TINSLEY, BETTY, ET AL.
vs.
MATSON NAVIGATION COMPANY, ET AL.
A050220
San Francisco County No. 900069

BY THE COURT:

The petition for rehearing is denied.

Dated: June 2, 1992

KLINE, P.J.

First Appellate District, Division Two, No. A050220
S027782

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

BETTY TINSLEY Et Al., Appellants

v.

AMERICAN PRESIDENT LINES, LTD., Respondent

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

FILED:
September 17, 1992
Robert Wandruff Clerk

Constitution of the United States

Article III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a States and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . .

Title 46, United States Code

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States

conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Title 15, United States Code

§ 1333. Labeling; requirement; conspicuous statement

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health". Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

[*1985 Amendment*]

§ 1333. Labelling; requirements; conspicuous statements

(a) Required warnings; packages; advertisements; billboards.

(1) It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

> **SURGEON GENERAL'S WARNING:** Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(b) Conspicuous statement; label statement format; outdoor billboard statement format

(1) Each label statement required by paragraph (1) of subsection (a) of this section shall be located in the place label statements were placed on cigarette packages as of October 12, 1984. The phrase "Surgeon General's Warning" shall appear in capital letters and the size of all other letters in the label shall be the same as the size of such letters as of October 12, 1984. All the letters in the label shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package.

§ 1340. Cigarettes for export

Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

Title 28, United States Code

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Restatement (Second) of Torts

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

§ 1714.45. Product liability action; Liability of manufacturer or seller.

(a) In a product liability action, a manufacturer or seller shall not be liable if:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

BETTY TINSLEY, et al.,	)	Case No. 900069
	)	
Plaintiffs,	)	
	)	
vs.	)	PLAINTIFFS' MEMORANDUM
	)	OF POINTS AND AUTHORITIES
MATSON NAVIGATION	)	IN OPPOSITION TO JOINT
CO., et al.,	)	MOTION FOR SUMMARY
	)	JUDGMENT
Defendants.	)	
	)	

INTRODUCTION

Plaintiffs respond herewith to Philip Morris Incorporated's ("Philip Morris") and American President Lines Ltd.'s ("APL") motion for summary judgment. Plaintiffs argue that numerous issues of fact are presented by their claims and that movants are not, as a matter of law, entitled to summary judgment.

...

B. Triable Issues of Fact Exist as to Whether the Decedent's Injuries Occurred In the Course of His Employment by APL

The Jones Act creates a cause of action in favor of any seaman who suffers personal injury or death in the course of his employment. 46 USC Sec. 688. Under the Act,

plaintiffs may recover if the facts show that negligence played any part, *even the slightest*, in producing the injury complained of. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 77 S.Ct. 457 (1957). See also, *Chisholm v. Sabine Towing & Transportation Co.*, 679 F.2d 60, 62. Among the activities that have imposed liability for negligence on shipowners is the provision of defective or inadequate consumables to crewmembers. *Fratta v. Grace Lines, Inc.*, 139 F.2d 743.

Defendant APL sold cigarettes to members of its ships' crews. Deposition of Gerald Carbiener 18:8-25 (See declaration of Paula A. Montesanti, ex. K). Charles Tinsley purchased cigarettes while employed by APL, Deposition of Raymon Quintana 77:7010 (Declaration of Paula A. Montesanti, ex. E), Deposition of Betty Tinsley, 68:21-24 (Declaration of Paula A. Montesanti, ex. H). Some of the cigarettes he purchased from APL he brought home and smoked ashore. Deposition of Dennis Tinsley, 104:9-15 (Declaration of Paula A. Montesanti, ex. B). Charles Tinsley died of lung cancer. (Declaration of Paula A. Montesanti, ex. L)

As lung cancer is commonly associated with cigarette smoking, triable issues of fact therefore exist as to:

1) whether the cigarettes purchased by Mr. Tinsley from APL played any part -- even the *slightest* -- in causing his cancer;

2) whether cigarettes purchased at sea but smoked ashore played any part -- even the *slightest* -- in causing his cancer;

3) whether the cigarettes sold by APL were in some way defective;

4) whether APL was negligent in providing such cigarettes to Mr. Tinsley.

As Mr. Tinsley purchased cigarettes from APL during the course of his employment by it, the *sale* of those cigarettes

is alleged as the negligent act imposing liability under the Jones Act. Complaint para. 15. Movants' assertion that "plaintiffs must prove that the cigarette smoking which allegedly caused decedent's death was done as a seaman and 'in the course of employment'" is simply an incorrect statement of the law. But assuming, arguendo, that this is not an incorrect statement of the law, a triable issue of fact still exists as to whether the cigarettes Mr. Tinsley did smoke during the course of his employment played any part -- however slight -- in causing his lung cancer.

...

C. Triable Issues Of Fact Exist As To Whether The Sale Aboard Merchant Ships Of Cigarettes Without Health Warnings Constitutes An Unseaworthy Condition

Under the maritime law doctrine of unseaworthiness, vessel owners are under an absolute and non-delegable duty to provide a seaworthy vessel -- that is, a vessel reasonably fit for its intended purpose. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455. This duty is distinct from the negligence principles arising under the Jones Act. *See Gosnell v. Sea-Land Service*, 782 F.2d 464 (1986). The duty, in the nature of a warranty, extends not only to a ship's hull, but to all its appurtenances and equipment. *Mahnich, supra*. Thus, no matter how sound a vessel may be in every other respect, a defective condition that proximately causes a seaman's injury renders the ship unseaworthy as to him. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 2221, 28 S.Ct. 1201 (1938). The doctrine was long ago extended to the ship's stores, and the failure to supply the crew with good provisions will render the ship unseaworthy. *Dion v. The Cyrus*, F. Cas. No. 3930 (1789).

Whether an unseaworthy condition exists as alleged is

generally a question of fact for the jury to decide, *Jordon v. United States Lines*, 738 F.2d 18 (1984). An instruction that a ship is unseaworthy as a matter of law is reversible error. *See Dunlap v. G.O.C. Towing Inc.*, 613 F.2d 493 (1980).

An important distinction between the unseaworthiness doctrine and negligence is that unseaworthiness imposes liability without fault. *See Seas Shipping Co. v. Sieracki*, 326 U.S. 85, 66 S.Ct. 872 (1978). Thus, if an unseaworthy condition is shown to exist, the exercise of reasonable care does not relieve the shipowner of liability. See *Mahnich v. Southern S.S. Co.*, *supra.*

Thus, movants' assertion that the APL vessels which sold cigarettes without warnings were seaworthy as a matter of law (Memo 20:23-26) misstates the applicable law. Moreover, movants' argument that unseaworthiness does not arise unless the ship is "unable to weather storms or withstand perils of the sea" (Memo 21:1-3) is without authority, and, as a matter of law, incorrect.

Moreover, the claim that the provision of cigarettes by APL was pursuant to statute is irrelevant to any determination of unseaworthiness stemming from the absence of warning labels (Memo 21:9-13). Shipowners are also required by statute to furnish vessels with various safety appliances. See 46 USCA Sec. 3305. Should one of those appliances prove defective, the shipowner could not rationally seek to avoid liability by arguing that the appliance was furnished pursuant to statute.

Further, while cigarettes sold outside the United States are exempt from the requirements of the labeling act, that act does not *prohibit* warning labels from being affixed to such cigarettes. *See* 15 USC Sec. 1331 *et seq.* In fact, Philip Morris began to include such labels on cigarettes manufactured for sale at sea about the time this complaint was filed. Deposition of Ronald Bornheutter 16:14-25. (See

Declaration of Paula A. Montesanti, ex. F).

Additionally, there is no statutory prohibition against APL's providing a warning substantially similar to that printed on the cigarette packages. However, APL did not, and does not, provide such warnings on its ships. Deposition of Gerald Carbiener, 24:8024 (See Declaration of Paula A. Montesanti, ex. K).

Thus, APL and Philip Morris are not, as a matter of law, relieved of liability for unseaworthiness merely because they have not violated any statute. A clear triable issue therefore remains as to whether cigarettes sold without health warnings constitute an unseaworthy condition under the maritime law.

D. Triable Issues Exist As To Whether the Presence of Warning Labels Proximately Caused Decedent's Death

Movants are mistaken as to both the probative value of Betty Tinsley's testimony, and the quantum of proof required to show proximate cause in Jones Act negligence claims.

As noted above, a Jones Act claimant need only show that the defendant's negligence played *some slight* part in causing the injuries alleged. Thus, even if movants succeed in showing that Mr. Tinsley smoked a certain percentage of cigarettes purchased ashore, they have not, as a matter of law, shown that the cigarettes he smoked at sea -- or purchased at sea and smoked ashore -- would have been purchased despite the warnings on the cigarettes purchased ashore. Nor would they have shown that cigarettes purchased at sea, as a matter of law, played *no* part in causing his lung cancer.

Further, the conclusions drawn by movants from deposition testimony are disputed by plaintiffs.

Thus, the actual number of cigarettes smoked by Mr. Tinsley ashore is unclear. See plaintiffs' Statement, No. 31.

The cigarettes smoked by Mr. Tinsley ashore were not purchased exclusively at retail outlets. See plaintiffs' Statement, No. 33.

Contrary to movants' assertion, Mr. Tinsley was not aware of the Surgeon General's report on smoking and health when it first appeared, and Mrs. Tinsley never discussed it with him. See plaintiffs' Statement, No. 34.

Moreover, because Mr. Tinsley obtained cigarettes without warnings from shipmates while ashore, most -- if not all -- the cigarettes he smoked ashore had no warnings. Thus, there is a triable issue as to how many warnings he actually saw when he smoked in his wife's presence. See plaintiffs' Statement, No. 37.

Thus, triable issues exist as to

1) the source of cigarettes Mr. Tinsley smoked while ashore;

2) whether he saw any warning labels on cigarettes smoked ashore,

3) whether he was aware of the Surgeon General's report; and

4) whether the Jones Act quantum of causation is met, regardless of how many cigarettes Mr. Tinsley smoked ashore.

Further, movants' reliance on *Harrison v. Flota Mercante Gran Colombiana, S.A.* 577 F.2d 968 (1978) is misplaced. That court found that an inadequate warning *was* the proximate cause of an injury, even though a warning label was *not* read. In this case, the *absence* of any warning is *a fortiori* a triable issue as to proximate cause.

E. Plaintiffs' Claims Are Not Preempted By The Federal Cigarette Labeling Act.

...[T]he federal Cigarette Labeling and Advertising Act

. . . is inapplicable to plaintiffs' complaint for several reasons.

First, plaintiffs do not bring their action under the tort law of this state. Rather, they allege the jurisdiction of the Jones Act, and the general maritime law. Complaint, Para. 2. Since 1789, maritime - or admiralty - cases have been brought at the suitor's election in state courts. *See* Gilmore & Black, *The Law of Admiralty*, 2d ed., Sec. 1-13. See also 28 USC Sec. 1333. In California, as in other jurisdictions, federal maritime law is applied to seamen's actions brought pursuant to Sec. 1333. See *Baptiste v. Superior Court* (1980) 106 Cal.App.3d 87, 94. *See also Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501(1918).

This case is not, therefore, a "state law damage claim." Rather, it is to be decided under a specialized body of *federal* law. Movants do not show how the federal cigarette labeling act has preemptive effect over this body of federal law.

. . .

F. This Case Is Not a Products Liability Claim; State Codes Do Not Apply To Maritime Claims.

While products liability cases are cognizable under the general maritime law, *see Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.*, 565 F.2d 1129 (1977), a plaintiff must, as plaintiffs in *Pan-Alaska* did, plead a products liability cause of action.

In this case, plaintiffs do not allege any cause of action for products liability. Movants regard plaintiffs' negligence and unseaworthiness claims as mere "rubrics" to be cast aside . . . Yet the same rationale would recast *all* unseaworthiness claims as product liability claims simply because unseaworthy conditions invariably involve some kind of defect. . . As plaintiffs do not allege a products liability

cause of action here, movants' attempt to apply the principles of the Restatement, 2d, of torts is improper, notwithstanding the acceptance of those principles by the admiralty bench...

[W]ith regard to Civil Code Sec. 1714.45: . . . as a state law statute, it is not applicable in this action. See Section E, *supra*.

FOR THE CITY AND COUNTY OF SAN FRANCISCO

BETTY TINSLEY, et al., Plaintiffs,
v.
MATSON NAVIGATION CO., et al., Defendants
and
RELATED CROSS ACTION

No. 900069

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE HON. ROBERT L. DOSSEE, JUDGE

DEPARTMENT NO. 3

JUNE 8, 1990

A p p e a r a n c e s

For the Plaintiffs Lyle C. Cavin, Jr.;
For the Defendant and Cross-Complainant American President Lines: Robert J. Finan;
For the Cross-Defendant Philip Morris: Gary R. Long.

PROCEEDINGS

THE COURT: Good morning. Tinsley v. Matson.

MR. CAVIN: Lyle C. Cavin, Jr., on behalf of the plaintiffs.

MR. FINAN: Robert Finan on behalf of defendant and cross-complainant American President Lines.

MR. LONG: Gary Long on behalf of cross-defendant Philip Morris.

THE COURT: I have read and considered the paper work that you filed in connection with this motion for summary judgment.

Anything further that you would like to state to the court that you have not put in your papers?

MR. LONG: For the record, we would like to state our objection again under C.C.P. 437C (B) to the deposition testimony submitted by plaintiffs, which is either hearsay or without foundation, noted in footnote 2, page 10, of our reply brief.

MR. CAVIN: I would like to summarize the plaintiffs' position in this matter.

In the previous two motions I have been very brief. I would like two or three minutes.

The summary judgment motion should be denied unequivocally.

Never seen so many references to "as a matter of law" by defendants' moving papers that are totally unsupported by any facts or law.

What must be kept in mind is that plaintiff is not suing Philip Morris to begin with.

There are clear triable issues of fact as to whether the defendant American President Lines was negligent under the Jones Act, whether their vessel was unseaworthy for providing cigarettes without warnings, triable issues as to whether negligence or unseaworthiness was a cause or contribution to Mr. Tinsley smoking and his ultimate death due to lung cancer.

In making the determination on the motion, this court is bound to apply maritime law, not California law or not any other law.

The defendants have chosen to approach this motion by attempting to hoodwink the court into believing this is nothing more than a products liability action designed to

circumvent Civil Code Section 1714.45.

Nothing is further from the truth.

Why would we bring an action under California Products Liability law when we have such generous remedies and liberal quantum-of-proof standards under the maritime law?

It would be much easier to prevail in this case under the maritime law than any products liability theory.

However, Your Honor, you do realize if the plaintiffs chose to sue Philip Morris under the products liability law of the State of California, which we haven't -- but, if we chose to do so, we could.

Under Section D of 1714.45, actions for defective products are not precluded.

But that is not the point.

We have here four very reputable law firms defending American President Lines and Philip Morris who demonstrate either, one, an ignorance of maritime law, which I find hard to believe given Mr. Finan's experience and expertise in the area, or four law firms that feel they owe this court no duty of candid and appropriate disclosure with regard to their points and authorities.

This case isn't complex and it clearly falls within the confines of maritime law. The issues require adjudication by the trier of fact.

The fact that Mr. Tinsley may have been aware of the Surgeon General's warnings on some of the cigarettes he smoked or ads he saw is all proper fodder for a jury to consider.

They must be asked to decide the ultimate issue in this case, which is whether the lack of warning on those cigarettes played a role or contributed to his continuing to smoke and his ultimate death.

And the jury is the only one who can decide whether the cigarettes amounted to an unseaworthy condition or if

American President Lines was negligent in putting them aboard the vessels.

Furthermore, this is not a case of preemption.

One very excellent reason. A summary judgment motion may only raise the presumption issue to assert a jurisdictional defect, which they never raised in this case.

It is also horn-book law that preemption operates under the supremacy laws of the constitution to limit the reach of state laws that conflict with Congress' exercise of its law making authority. Congress may preempt state law by express statement by, quote, occupying the field, unquote, of a given area of the law or where state law actually conflicts with federal law. This is taught in first year law school. But there is no dispute the Cigarette Labeling Act has been held to prevent state law damage actions that challenge the adequacy of the congressional labeling requirement.

This is not a state law action. This action doesn't challenge the adequacy of the warnings that Congress ordered placed on cigarette packages. We aren't even suing Philip Morris.

Philip Morris and APL should be asked to explain how the principles of federal preemption law can conceivably apply when no state law claims are being raised and no challenge to the warnings that were mandated by Congress have been questioned.

As to the contention that the negligent act did not occur on an APL vessel, it is absurd.

The negligent act was the sale of the cigarettes on APL vessels whether or not Mr. Tinsley smoked any of them at sea.

The defendants and cross-defendants have gone to great lengths to try to impress the court with statistics regarding how much time Mr. Tinsley spent at sea, how much of that time was spent on APL vessels, how many cigarettes he

smoked at sea as opposed to ashore, how many cigarettes he bought ashore as opposed to at sea, none of which makes a damn bit of difference in this case.

For the record, if you want to crunch numbers, between 1964 and '67 the effective dates of the Warning Acts, Mr. Tinsley spent 85 percent of his time at sea on APL vessels.

Philip Morris has gone to great lengths to raise the warning act, as I indicated earlier; but it has no bearing regarding a maritime cause of action.

Compliance with the statute doesn't dispose of an issue of negligence or unseaworthiness and certainly Philip Morris' compliance with the statute has nothing to do with American President Lines' responsibility to provide a seaworthy vessel.

The defendants have cited the Slop Chest Act, which is misplaced, has no relevance to this action.

The allegation doesn't state they didn't comply with the Slop Chest Act. Says they provided a defective supply of the products.

The defendants throughout their moving papers - and I take it that explains the length of their moving papers - have brandished nothing but broad and conclusionary statements as opposed to any factual contentions that are undisputed, and an example, quote, as a matter of law the presence of cigarettes, even without health warnings, in the Slop Chests onboard merchant vessels, including those owned and operated by APL, doesn't make those vessels unseaworthy, and followed by absolutely nothing more than argument that they should save for a jury.

Their reliance upon the citations on that aspect have nothing to do with defective merchandise in Slop Chests.

Again, the Cigarette Warning Act has nothing to do with the Plaintiffs' claim. We are not suing Philip Morris.

But, by the way, the Cigarette Warning Act does not prohibit the manufacturer from placing warnings on their

cigarettes sold at sea. In fact, they are doing that very act right now.

They cite the Cippollone case.

If it were a state law products liability case, I'd probably raise the Cippollone case on behalf of Philip Morris myself. But the Cippollone case wasn't disposed of by summary judgment.

Again, it is not a state products liability case.

They rely on the Restatement of Torts.

This is not a maritime products liability case.

Finally, the defendants have cited 1714.45.

And I am not sure of their argument. Couldn't make much sense of it.

They say 1714.45 is consistent with accepted principles of maritime law.

That is another unsupported conclusionary statement.

The Restatement of Torts has not been uniformly adopted into the maritime law to begin with.

Then they cite a case that says some state law may apply where the injury occurred within the boundaries of that state.

Your Honor, the act of negligence occurred beyond the territorial limits of the United States. It had to have occurred there. They are not permitted to sell them within the territorial limits of the United States.

What the defendants are trying to do is have you evaluate manifestation of injury as the tortious act. That is clearly not the case.

For all of these reasons and many more, Your Honor, there are various triable issues of fact that must be disposed of by the jury and not a summary judgment.

Thank you.

MR. FINAN: I have nothing to say other than to comment upon the fact that having listened very closely to Mr. Cavin's argument during the last few minutes I fail to

hear anything new that wasn't stated in the opposition papers.

I fail to hear any new cases cited or authorities. We believe we succinctly set forth all the authorities upon which we rely. We believe there is no material issue of fact in dispute and summary judgment should be granted as a matter of law.

THE COURT: Matter submitted?

MR. CAVIN: Yes.

MR. LONG: I would like to point out I heard Mr. Cavin's argument and Philip Morris certainly believes the authorities submitted by him or in his papers -- no need to repeat them. The evidence submitted by Mr. Cavin doesn't submit issues of fact; but, moreover, I haven't heard Mr. Cavin and no one dispute the facts as to the cross-claim against Philip Morris or the law as to the cross-complaint against Philip Morris. Certainly summary judgment should be granted for Philip Morris.

MR. CAVIN: We are not suing Philip Morris.

THE COURT: Motion for Summary Judgment by American President Lines is granted. Motion by Philip Morris is also granted.

Thank you, Gentlemen.

No. A050220

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION I

BETTY TINSLEY, et al.,
Plaintiffs and Appellants,
v.
AMERICAN PRESIDENT LINES, LTD.,
Defendant and Respondent.

APPELLANTS' OPENING BRIEF

Appeal from the Judgment of The Superior Court
of California, County of San Francisco,
Honorable Robert L. Dossee, Judge

Lyle C. Cavin, Jr., and Jeffrey M. Cowan
Attorneys for Plaintiffs and Appellants

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2. Because The Jones Act Burden of Proof is Light, Appellants Need Only Show That APL's Negligence Played the Slightest Part In Causing The Injury Alleged.

Evidence that Charles Tinsley smoked cigarettes other than aboard APL ships, like evidence that his smoking was not a job requirement, when viewed in the light most favorable to appellants, shows only that Mr. Tinsley's injuries may have had multiple causes or that he may have been contributorily negligent. But neither multiple causation nor contributory negligence precludes recovery under the

Jones Act. It is a well-established principle of maritime law that a Jones Act plaintiff need only demonstrate that the employer's acts or omissions played any part, even the slightest, in causing the injuries alleged. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed. 2d 511, 514 (1957).[4] This important distinction from common law negligence is ignored by APL.

The extremely slight quantum of causation under the Jones Act derives from the FELA imposition of liability for "injury or death resulting in whole or in part from the negligence" of rail carriers. See 45 U.S.C. Sec. 51. Justice Brennan's analysis of this language provides explicit guidance for the court:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that *employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.* Judicial appraisal of the proofs to determine whether a jury question is present is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. *Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or*

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[4] It is this burden that has been described by a leading commentary as "featherweight." See Gilmore & Black, The Law of Admiralty, p. 377 (2d ed. 1975).

> *not the evidence allows the jury a choice of other probabilities.*
>
> The statute expressly imposes liability on the employer to pay for damages for injury or death due *"in whole or in part"* to its negligence.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506-507, 77 S.Ct. 443, 448-449, 1 L.Ed. 2d 493, 499-500 (1957) (emphasis in quotation marks in original). Under these principles, APL's evidence of concurrent causation, including evidence purporting to show Mr. Tinsley's contributory negligence, is simply not sufficient to take appellants' negligence count from the jury.

The minimal Jones Act quantum of proof essentially displaces common law requirements of proximate cause. See *Schultz v. Pennsylvania Railroad Co.*, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956) (Inference of employer negligence sufficient to submit case to the jury). APL's discussion of proximate cause not only ignores the effect of the slightest cause requirement, but vastly overstates the showing required of appellants at this stage of the litigation. APL's contention that "plaintiffs must necessarily prove that if cigarettes sold aboard APL vessels had contained a warning as to the health consequences of their use, the decedent would not have purchased and consumed cigarettes sold by his employer and the injury and death alleged would have been avoided" (CT 540:2-7) is unsupported by a single authority. The sole inquiry, under *Rogers v. Missouri Pacific*, is whether appellants can make the inference that APL *"played any part at all"* in causing the injury alleged. Whatever appellants' burden of proof at trial, the showing necessary at this stage is simply not as extensive as APL claims.

Appellants' complaint alleges that APL sold cigarettes

without warning labels, knowing that Charles Tinsley would, in the absence of such labels, consume the cigarettes. (CT 30:8-11) Appellants urge that the jury should decide whether the absence of health warnings made no difference to Mr. Tinsley's decision to smoke, [a position] only supported by evidence that he sometime bought cigarettes with warning labels ashore. (CT 540:13-17) But as many as 85% of the cigarettes smoked by Mr. Tinsley during periods ashore were cigarettes *without* warnings purchased at sea. (CT 942:6-16 Compared to the shoreside smoker who saw the warnings all the time, Mr. Tinsley was thus exposed to the warnings only a small fraction of the time he spent ashore. APL has offered no evidence to preclude a jury from reasonably deciding that the frequency of exposure to health warnings increases the likelihood of a consumer's compliance with that warning.[5] Nor has APL offered evidence to show that Mr. Tinsley would have ignored the warnings if he had been exposed to them each and every time he lit a cigarette.

Similarly, Charles Tinsley's supposed awareness of the 1964 Surgeon General's Report on Smoking and Health[6] does not show, as a matter of law, that APL's sale of cigarettes without warnings did not play the slightest part in causing his injuries. In any case, Mr. Tinsley's awareness of the report, asserted by APL (CT 540:21-22) is disputed. Mr. Tinsley's wife testified in deposition as follows:

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[5] Congress has required the Surgeon General's warning on "each package of cigarettes" covered by 15 USC Sec. 1331 *et seq.*, not on some packages or for limited times. This requirement strongly suggests that Congress regarded constant exposure to warnings as an important component of their efficacy. See 65 U.S. Code Cong. and Admin. News, 2352.

[6] This report has not been introduced into evidence.

Q. Did your husband ever mention anything that you recall about the surgeon general's first report on smoking and health?
A. No, he never--it was never discussed.
Q. Do you know if he was ever aware of that?
A. If he was, I'm not aware of it.

(CT 931:9-14) To the extent that knowledge of the Surgeon General's report has any relevance at all, Mr. Tinsley's knowledge is clearly in dispute. Resolving any doubts in favor or appellants, the trial court could not properly have concluded that Mr. Tinsley was aware of the report, much less that he had grasped its substantive contents. But even if Mr. Tinsley could be shown to have known about the report, this fact, viewed in the light most favorable to plaintiffs, is only evidence of contributory negligence, and insufficient, as a matter of law, to preclude recovery under the Jones Act.

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C. BECAUSE APPELLANTS' SUIT WAS BROUGHT UNDER FEDERAL LAW, SUMMARY JUDGMENT COULD NOT PROPERLY HAVE BEEN GRANTED ON THE BASIS OF FEDERAL-STATE PREEMPTION; APPELLANTS' CLAIMS DO NOT CONFLICT WITH ANY CONGRESSIONAL PURPOSE.

1. This Action Was Properly Brought In State Court Under The "Saving To Suitors" Clause Of The Judiciary Act; Federal Maritime Law, Not State Law Governs This Case.

Article III, Section 2 of the Constitution of United States extends the judicial power of the United States "to all Cases

of admiralty and maritime jurisdiction." This grant of power was implemented by Congress in the Judiciary Act of 1789, which provided that

> ...the district courts...shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction...*saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.*

1 Stat. 76-77[13] (emphasis added). This "saving to suitors" clause confers on state courts concurrent jurisdiction with federal courts to entertain suits governed by admiralty law. *Madruga v. Superior Court*, 346 U.S. 556, 560-561, 74 S.Ct. 298, 300-01, 98 L.Ed 290, 290 (1954).

It is well-settled that when a maritime case is instituted in a state court, that court is required to apply maritime law so as to preserve all substantive admiralty rights of the litigants. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239, 243 (1942). As Justice Traynor has explained,

> A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought

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[13] The relevant part of the amended statute reads:

> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*

28 U.S.C. Sec. 1333 (emphasis added).

> there, must determine the rights of the parties under maritime law as a "system of law coextensive with, and operating uniformly in, the whole country." [citations]

(1945) 26 Cal. 2d 365, 370-371, 159 P.2d 1, 6. Stated otherwise,

> A state court is not free to apply its own substantive law to a maritime cause of action simply because the state court has subject matter jurisdiction. The applicable law is not determined by the choice of forum. *General substantive maritime law must be applied even though the suit is brought in the state court.* [Citations]

Blevens v. Sfetku (1968) 259 Cal.App.2d 527, 534, 66 Cal.Rptr. 486, 489 (emphasis added). In the area of maritime torts, California courts have long recognized that

> their task has been that of ascertaining and *applying appropriate legal principles derived from the considerable body of federal maritime law* that has developed in the United States.

Baptiste v. Superior Court (1980) 106 Cal.App. 3d 93, 95, 164 Cal.Rptr. 789, 792. (emphasis added), *see also Dixon v. Grace Lines, Inc.*, (1972) 27 Cal.App.3d 278, 103 Cal.Rptr. 595 (Jones Act and maintenance and cure claims properly tried in state court); *Catania v. Halcyon Steamship Co.* (1975) 44 Cal.App.3d 348, 118 Cal.Rptr. 513. (Federal substantive law governs, although California procedure followed.)

The implications of the foregoing rules on appellants' suit are clear. Having properly pleaded causes of action for negligence under the Jones Act and unseaworthiness under

the general maritime law, they are entitled to an adjudication of their claims through the application of federal, not state law. Notwithstanding the forum, substantive California law, including the provisions of Civil Code Sec. 1714.45, will not determine the parties' respective rights and liabilities. It also follows that defenses presuming state law causes of action are insupportable. For this reason, APL's defense of preemption is invalid, as the defense presumes that plaintiffs' claims arise under the common law of this state, not the law of admiralty.

SUPREME COURT
OF THE STATE OF CALIFORNIA

No. A050220

BETTY TINSLEY, et al.,
Plaintiffs and Appellants
v.
AMERICAN PRESIDENT LINES, LTD.
Defendant and Appellant

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION TWO

. . .

ISSUES PRESENTED FOR REVIEW

1) Did the Court of Appeal err in applying common law tort principles to affirm summary judgment of appellants' admiralty causes of action, and thereby deprive appellants of their right to an adjudication under the maritime law?

2) Did the Court of Appeal err, on review of summary judgment, in affirming judgment on the basis of inferences made in favor of the moving party?

STATEMENT OF THE CASE

This appeal involves the adjudication of maritime causes of action in state court.

Appellants are the heirs of Charles Tinsley, a merchant seaman who died of lung cancer associated with cigarette

smoking. Appellants brought suit for wrongful death against respondent American President Lines, Ltd. ("APL"), the owner of merchant ships on which Tinsley was employed at various times. The suit alleged that APL was negligent under the Jones Act, 46 U.S.C. §688, for selling Tinsley cigarettes without health warning labels. The suit also alleged, under the general maritime law, that the presence of such cigarettes created an unseaworthy condition on the vessels aboard which Tinsley worked and lived. Exercising the election available to them, appellants brought suit in state court.

Because this case sounds in admiralty, the substantive law to be applied, regardless of the forum, is federal maritime law, not the common law of this state. But the Court of Appeal's affirmance of summary judgment against appellants unambiguously invokes common law tort doctrines alien to the maritime law. Specifically, the court applied elements of products liability law to appellants' unseaworthiness claim, and failed to apply the proper test for submitting Jones Act cases to the jury.

This Court has long recognized the principle of uniform application of federal maritime law in state courts. Thus, the Court of Appeal's affirmance not only denies appellants the enjoyment of rights peculiar to federal maritime law, but disrupts California precedents concerning the adjudication of maritime causes in this jurisdiction.

Appellants therefore seek review to secure this Court's reaffirmation of their right to litigate their claims in the courts of this state under the maritime laws of the United States.

. . .

I. THE AFFIRMANCE OF SUMMARY JUDGMENT ON COMMON LAW PRINCIPLES CONFLICTS WITH DECISIONS OF THIS COURT AND LOWER APPELLATE COURTS THAT REQUIRE APPLICATION OF MARITIME LAW TO MARITIME CAUSES OF ACTION IN STATE COURT.

It is well-settled that when a maritime case is instituted in a state court, that court is required to apply maritime law so as to preserve all substantive admiralty rights of the litigants.

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure.

Garrett v. Moore-McCormack Co., 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239, 243 (1942). This principle was early applied in the California courts:

> A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought there, must determine the rights of the parties under the maritime law as a "system of law coextensive with, and operating uniformly in, the whole country." [citations]

Intagliata v. Shipowners & Merchants Towboat Co., Ltd. (1945) 26 Cal.2d 365, 370-371, 159 P.2d 1, 6. Stated

otherwise,

> A state court is not free to apply its own substantive law to a maritime cause of action simply because the state court has subject matter jurisdiction. The applicable law is not determined by the choice of forum. General substantive maritime law must be applied even though the suit is brought in state court. [citations]

Blevens v. Sfetku (1968) 259 Cal.App.2d 527, 534, 66 Cal.Rptr. 486, 489. In the area of maritime torts, California courts recognize that

> their task has been that of ascertaining and applying appropriate legal principles derived from the considerable body of federal maritime law that has developed in the United States.

Baptiste v. Superior Court (1980) 106 Cal.App.3d 93, 95, 164 Cal.Rptr. 789, 792.

The implication of these rules is clear: Having properly pleaded causes of action for negligence under the Jones Act, and unseaworthiness under the general maritime law, appellants are entitled to an adjudication of their claims through the application of *federal*, not state law. Notwithstanding the forum, substantive California law will not determine the parties' respective rights and liabilities. It follows that, to the extent that the Court of Appeal applied California law - or failed to apply federal law - to this case, reversible error is shown.

A. The Court of Appeal Erred In Applying The Common Law Products Liability Doctrines Of Consumer Expectation And Known Danger To Appellants' Unseaworthiness Cause Of Action.

The complaint in this action alleges that "cigarettes without health warnings constitute a defective and unseaworthy condition." [complaint, ¶13]. At pp. 8-9 of its decision, the Court of Appeal stated:

> We seriously question whether such labeling distinction is a sufficient basis to establish an unseaworthiness claim. Cigarettes with or without warnings attached are equally dangerous. The only advantage of a warning is that those consuming cigarettes which are marked are probably more aware of the dangers involved. However, even assuming this to be true, *appellants have cited no legal principle which would obligate a ship owner to warn his seamen of the commonly known dangers inherent in common consumer products.* Implying such an obligation is unwarranted.
>
> [Emphasis added]

This analysis, however, is immaterial to an unseaworthiness claim. Under the general maritime law, liability will be imposed because of an unseaworthy condition of the ship, whether or not the shipowner had knowledge of the condition, and without regard to due diligence or reasonable care in avoiding the condition. See generally, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960) *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944). Thus, the shipowner's failure to warn is not an element of the

unseaworthiness cause of action, a principle actually acknowledged by the Court of Appeal at page 7 of its decision:

> If an unseaworthy condition can be shown to have caused an injury, the exercise of reasonable care or due diligence will not relieve the ship owner of liability.

Under the maritime law, whether the cigarettes at issue constituted an unseaworthy condition is to be determined without comparison to other cigarettes and without considering whether APL was under any duty to warn. Such factors are elements of products liability law, and have no place in unseaworthiness analysis.

Likewise, the issue of apparent dangerousness of common consumer products is a test arising under products liability law, but utterly absent from the general maritime law. Comment i to §402A of the Restatement (Second) of Torts states, in part:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer... *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.*
>
> [Emphasis added]

Comment j to the same section provides:

> In order to prevent the product from being

> unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use...But a seller is not required to warn with respect to products...*when the danger, or potentiality of danger, is generally known and recognized.*
>
> [Emphasis added]

These rules are codified at §1714.45, California Civil Code.[3]

The Court of Appeal erred because the failure to cite a rule obligating a shipowner to warn of commonly known dangers in common consumer products would be dispositive *only if* unseaworthiness causes of action were governed by §402A, as codified at CC §1714.45. But, like due diligence and consumer expectations, the concept of "known dangers" of "common consumer products" is not material to unseaworthiness analysis under the maritime law.

By affirming the dismissal of the unseaworthiness count because APL was not required to warn of commonly known dangers in common consumer products, the court permitted common law products liability doctrines to resolve a substantive question of maritime law. In so doing, the court

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[3] Civil Code §1714.45 provides:

a. In a product liability action the manufacturer or seller will not be liable if:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge, common to the community; and

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco and butter, as identified in comment *i* to §402A of the Restatement (Second) of Torts.

b. For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on the manufacturing defect or breach of an express warranty.

disregarded the federal and California authorities cited above. If uncorrected by this Court, the effect of such error would be to deprive appellants of their right to an adjudication of their unseaworthiness claim according to the maritime principles invoked by, and appropriate to, their well-pleaded cause of action.

B. The Court of Appeal Erred In Failing To Apply The "Slightest Causation" Test For Presenting Jones Act Cases To The Jury.

It is a well-established doctrine of maritime law that, in order to allow a case to go to the jury, a Jones Act plaintiff need only demonstrate that the employer's alleged negligence could have played any part, even the slightest, in causing the injuries alleged. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511, 514 (1957). As analyzed by the Supreme Court, this principle is especially applicable to motions for summary judgment:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,*including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is present is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. *Judges are to fix their sights primarily to*

> *make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.*

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506-507, 77 S.Ct. 443, 448-449, 1 L.Ed.2d 493, 499-500 (1957) (Emphasis added). In adjudicating appellants' Jones Act cause of actin, the Court of Appeal erred in failing to apply this test.

The court noted that Charles Tinsley smoked cigarettes before and after his employment as a seaman, and that the majority of the cigarettes he smoked were consumed on land. [Decision, p. 5] The court stated: "Given these facts, we must conclude Tinsley's injury was not suffered in the course of employment, but rather in the course of a lifetime habit." [Decision, p. 5] Since the Jones Act only provides a remedy for injuries suffered "in the course of employment," 46 U.S.C. §688, the court affirmed summary judgment on the ground that an essential element of a Jones Act claim was missing.

However, the above facts allow the reasonable inference that Tinsley's cancer could have arisen while he was employed by APL, as well as when he was not. Under *Rogers*, the possibility of multiple causation cannot keep a case from the jury. Thus, the facts are sufficient to present the question as to whether the negligence alleged -the sale of cigarettes without warnings to Tinsley while he was employed aboard APL's ships - played *any part at all* in causing his injuries.

But by determining that Tinsley's injuries were not incurred in the course of his employment, the Court of Appeal implicitly decided that such sales could not have played even the slightest part in causing the injury alleged.

The court thus disregarded the *Rogers* test, under which a jury question is presented even if APL's sales to Tinsley played a minor role in causing his cancer, and even if he smoked the majority of cigarettes ashore. In effect, the court relied on the common law preponderance of evidence test to decide an issue that the appropriate Jones Act test would send to the jury.[4]

This error again demonstrates the Court of Appeal's failure to apply the maritime law to a maritime cause of action. Rehearing by this Court is therefore necessary to preserve appellants' right to an adjudication under the rules applicable to their claims.

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[4] The policy concerns discussed by the court in this context do not realistically arise in Jones Act jurisprudence. [Decision, p. 5] In the first place, the Jones Act principle of comparative fault reduces the plaintiff's damages proportionately, *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed 265 (1939). In this case, proof that Charles Tinsley smoked cigarettes *with* warnings elsewhere than on APL's ships may be evidence of comparative fault, for which a jury could properly reduce any recovery his heirs might obtain. Second, APL would not be liable for Tinsley's injuries to the extent that it could prove that the injuries arose from his behavior when he was *not* in the service of APL's ships. Evidence of Tinsley's smoking elsewhere would be admissible on this point as well. In short, the "substantial public policy concerns" about widening liability do not support the court's decision.